



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

Application of Philip Myers for a Permit to Place a
Rock Filled Dock on the Bed of Lake Superior,
Town of LaPointe, Ashland County

Case No. 3-NO-99-02032

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

Philip J. Myers, 6304 Fallbrook Road, Eden Prairie, MN, 55344, applied to the Department of Natural Resources for a permit to construct a recreational boat dock on the bed of Lake Superior. The amended proposal will consist of removing remnants of an existing dock and replacing it with a new dock consisting of rock-filled oak log cribs 10 feet in width extending 70 feet waterward from an existing 16-foot long rock-filled log crib for a total length of 86 feet. The dock has a 14-foot "L" extending in a westerly direction and will have a 12-foot wash-through opening and a treated timber deck. The proposed project is located in Government Lot 3 of Section 3, Township 50 North, Range 2 West, in the Town of LaPointe, Ashland County.

On December 22, 1999, a notice was published which stated that unless written objection was received within 30 days the Department might make a decision on the application without a hearing. Several timely objections were filed.

Pursuant to due notice hearing was held on June 20, 2001, at Ashland, Wisconsin, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Philip and Terrie Myers, by

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FINDINGS OF FACT

1. Philip J. Myers, 6304 Fallbrook Road, Eden Prairie, MN 55344, completed filing an application with the Department for a permit under Wis. Stat. § 30.12, to place a rock filled dock on the bed of Lake Superior, Town of La Pointe, Ashland County. The Department and the applicant have fulfilled all procedural requirements of Wis. Stat. §§ 30.12 and 30.02.
2. The applicant owns real property located in Government Lot 3 in Section 3, Township 50 North, Range 2 West, Town of La Pointe, Ashland County. The above-described property abuts Lake Superior which is navigable in fact at the project site.
3. The applicant proposes to construct a new dock on the site of an existing remnant dock. The new dock would consist of rock-filled cribs 10 feet in width extending 70 feet waterward from an existing 16-foot crib. The dock would have a 14-foot L-extension with a 12-foot flow-through opening. The 10-foot width, larger than DNR standards for inland lakes, is typical of Lake Superior solid dock structures. (Lahti)
4. The purpose is to replace an existing dangerous remnant dock with a new dock in better repair. The applicant does not intend to moor boats overnight at the site, located on Madeline Island. The applicant does not have a home or other finished property at this location, and the dock would be used for recreational purposes to gain access to Lake Superior. The existing remnants are an attractive nuisance and a danger to users of the public waters of Lake Superior. (Myers, Lahti, See: Ex. 3B)
5. The proposed structure will not materially obstruct existing navigation on Lake Superior and will not be detrimental to the public interest upon compliance with the conditions of the permit set forth below.

6. The objector's primary concerns relate to the possibility of erosion and other changes to the shoreline relating to littoral drift. This beach has a stable slope and sand beach not subject to the erosion of other bluff clay areas on Madeline Island. As Mr. Lahti testified, lakeshore systems are highly dynamic and are subject to changing wind conditions, water levels, and wave and ice action. There are two principal types of currents along this shoreline: wave action from shore and long shore currents that run parallel to shore.

A solid structure built perpendicular to shore can interrupt littoral drift, and cause sediment accumulation on the up drift side and beach starvation on the down drift side. In this location the net drift runs from east to west. In all likelihood, the proposed pier will be less likely to cause impacts relating to littoral drift because of the flow-through design. However, it is not always possible to predict the impact of a particular structure in such a dynamic system. Accordingly, the permit includes a condition requiring modification if sand deposition or beach starvation became a problem. This condition is standard for solid dock structures on Lake Superior. (Lahti)

It should be noted that the applicant has already made several changes in his proposal to meet potential concerns about shoreline alteration. The "L" shape was modified to face west, to reduce impacts on long shore currents. The flow-through was increased from 10 to 12 feet. Further, the existing 16 by 16 concrete capped crib will be left in place. The dock will now be 70 feet from the existing concrete crib instead of 82 feet. As a result, Mr. Lahti opined that it was unlikely that there would be any significant shoreline alterations.

A preponderance of the credible evidence, including all expert testimony, indicate that it is unlikely that there will be detrimental impacts relating to shoreline alterations. In the event there are, the condition requiring changes in the pier will be protective of unexpected impacts on neighboring properties relating to sand accumulation or beach starvation.

7. There are no significant historical features in the area of the proposed dock. (Ex. 20) Clearing the dilapidated structure will be a net improvement to the natural scenic beauty of the area.

8. The proposed dock will not have a detrimental impact upon fishery or wildlife values. (Lahti, Ex. 19) There was no disputed fact in this regard presented at hearing.

9. There is an easement on the Myers property which purports to give certain riparian rights to the easement holders. However, nothing in the easement prohibits placement of the proposed pier. Further, the easement does not authorize the easement holder to construct a pier. This would be in violation of Wis. Stat. § 30.133, because the easement was granted after 1994.

10. The applicant is financially capable of constructing, maintaining, monitoring or removing the structure if it should be found in the public interest to do so.

11. The proposed structure will not reduce the effective flood flow capacity of Lake Superior upon compliance with the conditions in the permit.

12. The proposed structure will not adversely affect water quality nor will it increase water pollution in Lake Superior. The structure will not cause environmental pollution as defined in Wis. Stat. § 281.01(10), if the structure is built and maintained in accordance with this permit.

13. The Department of Natural Resources has complied with the procedural requirements of Wis. Stat. § 1.11 and Wis. Admin. Code ch. NR 150 regarding assessment of environmental impact.

DISCUSSION

The proposed solid dock is typical of other pier structures in this area of Lake Superior. The existing dock remnants are unsightly and dangerous. As DNR Water Management Specialist Duane Lahti testified, negligible environmental impacts are expected from construction of the dock. Those concerns relate to dredging and changes in the beach due to sand accretion/starvation. Ms. Fahien testified that her concerns about dredging would be met by the permit condition limiting dredging to the minimum needed to construct the pier. Further, the flow-through opening should minimize changes in sand deposition in the area. The objectors also rely on a perceived procedural flaw relating to not providing water depth information or a side view of the solid dock. Mr. Lahti, an experienced water management specialist who covers a wide territory, testified that he obtained the water depth information from contour maps and that he understood the project from his site visit. There is no question that the application was complete, and that the applicant has been very responsive in providing information and modifying the project to meet concerns.

Mr. Reynolds provided a lot of interesting historical information about the project site. The sandbar has been a consistent feature of the area, and Mr. Reynolds believes the beach, while scenic, to be a poor area for boating. Mr. Lahti agreed with this assessment. The applicant is aware of the sandbar and of the historic features of the area. It is not a great area for the navigation of boats which require any significant draft. The solid dock structure should not be taken as the camel's nose in the tent to later requests for future dredging to improve navigation in the area. However, the applicants have carried their burden of demonstrating that the proposed project will not be detrimental to the public interest and the permit must be issued.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 30.12 and 227.43(1)(b) and in accordance with the foregoing Findings of Fact, to issue a permit for the construction and maintenance of said structure to the conditions specified.

2. The applicants are riparian owners within the meaning of Wis. Stat. § 30.12.
3. The proposed facility described in the Findings of Fact constitute a structure within the meaning of Wis. Stat. § 30.12.
4. The project is a type III action under Wis. Admin. Code § NR 150.03(8)(f)4. Type III actions do not require the preparation of a formal environmental impact assessment.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicant a permit under Wis. Stat. § 30.12 for the construction of a structure as described in the foregoing Findings of Fact, subject, however, to the conditions that:

1. The authority herein granted can be amended or rescinded if the structure becomes a material obstruction to navigation or becomes detrimental to the public interest.
2. The permittee shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employee of the Department of Natural Resources for the purpose of investigating the construction, operation and maintenance of the project.
3. A copy of this permit shall be kept at the site at all times during the construction of the structure.
4. The permit granted herein shall expire three years from the date of this decision, if the structure is not completed before then.
5. The permittee shall obtain any necessary, authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.
6. The permittee shall notify the Water Management Specialist, Duane Lahti, not less than five working days before starting construction and again not more than five days after the project has been completed.
7. Any area disturbed during construction shall be seeded and mulched or riprapped as appropriate to prevent erosion and siltation.
8. No heavy equipment shall be operated in the lake at any time unless written notification is made to the Water Management Specialist, Duane Lahti, and at least five working days in advance.
9. No work shall be undertaken during fish spawning periods.

10. The permittee shall do no more dredging than is reasonably necessary to remove existing crib structures. No dredging will be allowed to create a channel to the new structure. The easement holders shall be informed of any future requests for dredging permits.

11. The plan, as modified, shall be followed: the "L" section shall face west, and a 12-foot flow-through shall be incorporated into the project design.

12. Acceptance of this permit shall be deemed acceptance of all conditions herein.

This permit shall not be construed as authority for any work other than that specifically described in the Findings of Fact.

Dated at Madison, Wisconsin on July 23, 2001.

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By _____
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53 to insure strict compliance with all its requirements.